

**STATE OF WISCONSIN**  
**Department of Commerce**

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*In the Matter of the PECFA Appeal of*

James McGlenn  
McGlenn Limited Partnership  
4500 W Mitchell St  
Milwaukee WI 53214-0000

PECFA Claim #53186-5142-10B  
Hearing #97-110

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**Final Decision**

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**P R E L I M I N A R Y   R E C I T A L S**

Pursuant to a petition for hearing filed August 5, 1997, under § 101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Industry, Labor and Human Relations, now Department of Commerce (Department), a hearing was commenced on July 21, 1998, at Madison, Wisconsin. A proposed decision was issued on October 20, 1998, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is:

Whether the Department's decision dated July 24, 1997 denying, reimbursement from the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of \$22,240.00 was reasonable and correct.

There appeared in this matter the following persons:

**PARTIES IN INTEREST:**

James McGlenn  
McGlenn Limited Partnership  
4500 W Mitchell St  
Milwaukee WI 53214-0000'

By: Ronald P. Brockman, Esq.  
Hand & Quinn  
932 Lake Ave  
Racine WI 53403-1519

Department of Commerce

PECFA Bureau  
201 West Washington Avenue  
PO Box 7838  
Madison WI 53707-7838

By: Kelly Cochrane, Esq.  
Department of Commerce  
201 W. Washington Ave., Rm. 623  
PO Box 7838  
Madison WI 53707-7838

The authority to issue a final decision in this matter has been delegated to the undersigned Terry W. Grosenheider, Executive Assistant, by order of the Secretary dated April 6, 1999.

The matter now being ready for decision, I hereby issue the following

#### FINDINGS OF FACT

The Findings of Fact in the Proposed Decision dated October 20, 1998 are hereby adopted for purposes of this Final Decision, with the addition of the following: "4. On June 18, 1998 and on June 22, 1998, the Department and the Appellant respectively and mutually entered into a Settlement Agreement (Settlement Agreement) (copy attached) disposing of all issues related to the petition for hearing filed in this matter on August 5, 1997, except for the issue related to the disposition of the denial of costs of \$22,240.00 associated with water wagon trucking costs. Additionally, the parties agreed as part of the Settlement Agreement that the Department would pay \$10,797.35 to the Appellant.

#### CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Decision dated October 20, 1998 are hereby adopted for purposes of this Final Decision.

#### DISCUSSION

The Discussion in the Proposed Decision dated October 20, 1998 is hereby adopted for purposes of this Final Decision.

#### FINAL DECISION

The Proposed Decision dated October 20, 1998, is hereby adopted as the Final Decision of the Department except that the phrase "...and the remainder of non-reimbursable costs is remanded to the department for resolution, if not otherwise resolved" is deleted from the Proposed Decision as adopted as the Final Decision. Additionally, the following is added to the Final Decision: The Settlement Agreement shall be incorporated into this Final Decision pursuant to which the Department is ordered to pay the Appellant \$10,797.35. This Final Decision as stated above disposes of all issues raised in this appeal.

#### NOTICE TO PARTIES

### Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

### Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6<sup>th</sup> Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: April 7, 1999

Terry W. Grosenheider  
Executive Assistant  
Department of Commerce  
PO Box 7970  
Madison WI 53707-7970

cc: Ronald P. Brockman, Esq.  
Kelly Cochrane, Esq.  
Dispute Resolution Coordinator, PECFA  
Date Mailed: April 7, 1999

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

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*In the Matter of the PECFA Appeal of*

James McGlenn  
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Milwaukee WI 53214-0000

PECFA Claim 9 53186-5142-10B  
Hearing # 97-1 1 0

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**SETTLEMENT AGREEMENT**

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1. Neither party admits by this settlement any error, omission, fraud, or lack of project supervision or oversight with regard to the submission or processing of a claim for reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA).
2. The Department of Commerce (department) agrees to pay to the appellant the sum of \$10,797.35 plus PECFA eligible interest and minus any remaining statutory deductible. This payment may also be reduced if it is subject to a reimbursement cap, including but not limited to, the \$40,000 cap on investigation costs and the cap on consultant costs based on a remedial cost estimate. Interest will only be paid if it was deducted from the claim being appealed. The eligible interest will be calculated by dividing the settlement amount by the total ineligible costs (net of interest) in the department's reimbursement decision and multiplying that fraction times the total interest deducted from the reimbursement because of ineligible costs. Interest will be computed to the date of the settlement payment only on final claims. The payment to appellant will be made within 15 working days of the department's receipt of an executed copy of this settlement agreement or the release of program funds, whichever occurs later.
3. This agreement is a full and complete settlement of all issues raised in the appeal filed August 5, 1997. The appellant agrees to entry of an order dismissing the appeal with prejudice. A copy of this agreement, executed by the parties, shall be deemed by the parties to be a joint motion to dismiss the appeal, and the department may issue an order dismissing such appeal, without advance notice to either party.
4. This agreement is made solely to settle a matter in dispute, and nothing in this agreement shall be construed to bind the department to any specific decision on any other claim by this party or any other party.
5. By their signatures, all parties represent that they are authorized to enter into this agreement. This agreement may be executed in counterparts. Copies, including facsimile transmittals, of this agreement shall be deemed originals.

Dated: 6-22-1998.

Dated: June 18, 1998.

James McGlenn  
McGlenn Limited Partnership  
4500 W Mitchell St  
Milwaukee WI 53214-0000

Kelly Cochrane  
Assistant Counsel  
Department of Commerce  
P O Box 7970  
Madison WI 53707-7970

**STATE OF WISCONSIN  
DEPARTMENT OF COMMERCE**

IN THE MATTER OF: The claim for  
reimbursement under the PECFA

MADISON HEARING OFFICE  
1801 Aberg Ave., suite A  
P.O. Box 7975

Program by

Madison, WI 53707-7975  
Telephone: (608) 242-4818  
Fax: (608) 242-4813

James MdGlenn  
McGlenn Limited Partnership  
4500 W Mitchell Street  
Milwaukee, WI 53214-5404

**Hearing Number: 97-110**  
**Re: PECFA Claim # 53186-5142-10B**

PROPOSED HEARING OFFICER DECISION

**NOTICE OF RIGHTS**

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decision is mailed. It is requested that you briefly state the reasons and authorities for each objection together with any argument you would like to make. Send your objections and argument to: Madison Hearing Office, P.O. Box 7975, Madison, WI 53707-7975. After the objection period, the hearing record will be provided to Christopher Mohrman, Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL Decision of the department in this matter.

RATE HEARING OFFICER:  
David C. Wagner

DATED AND MAILED:

**OCTOBER 20, 1998**

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MAILED TO:

Appellant Agent or Attorney

Department of Commerce

Attorney Ronald P. Brockman  
Hand & Quinn  
932 Lake Avenue  
Racine, WI 53403

Kelly Cochrane  
Assistant Legal Counsel  
P.O. Box 7970  
Madison, WI 53107-7970

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

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On July 24, 1997, the Department of Commerce issued an appealable order denying McGlenn Limited Partnership (hereinafter referred to as claimant) reimbursement in the amount of \$44,023.32, under the PECFA program. The claimant filed a timely appeal from such denial on August 4, 1997, and requested reimbursement of the denied costs. Pursuant to that appeal a hearing was held on July 21, 1998, at Madison, Wisconsin before David C. Wagner, Administrative Law Judge acting as hearing officer.

Prior to the taking of testimony it was stipulated that the only issue to be resolved at the hearing was the denial of \$22,240.00 in costs associated with the use of water wagons on the site.

Based on the applicable records and evidence in this case, the appeal tribunal makes the following

### **PROPOSED FINDINGS OF FACT**

1. At all times material, the claimant owned a 17-acre parcel located in Waukesha Wisconsin, a former railroad property.
2. During 1994 and 1995, the claimant undertook remediation of petroleum product contamination and submitted a claim under the PECFA program in the total amount of \$416,099.60.
3. During the course of remediation at the claimant's site, trucks were required to travel over unimproved roadways, and this caused a dust problem on the site as well as in the neighboring residential areas. Water was also used to aid in the compacting of soil that was replaced after it had been removed for remediation.

### **APPLICABLE LAW**

Section ILHR 47.30 (2) (a) [Now COMM 47.30(2)(a)] provides in part as follows:

(2) EXCLUSIONS FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143 Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial action activities under the cope of this chapter:

15. Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum product discharge from a petroleum product storage system or home oil tank system.

## **PROPOSED DISCUSSION**

The claimant contended that the remediation project undertaken at this site could not have been successfully completed without taking precautions to prevent dust contamination on the site and in the surrounding area. There was an extensive amount of trucking associated with the transfer of contaminated soils on the site, and this occurred on nonpaved access roads. There was no evidence adduced to establish that the generation of dust would have caused the claimant to be out of compliance with any air quality standard or would have subjected it to any nuisance litigation. The water wagons were also used to moisturize the soil which was returned to excavation sites in order that the soil could be compacted. This was necessary because the site was going to be used for the construction of residential housing, and without compaction, there would have been problems with the new construction associated with the settling of the soils.

There was no breakdown of the costs associated with the two disparate uses of the water wagons. Clearly, the costs associated with the use of the water wagons to compact the soil so that the property could be used for the construction of residential housing is not a cost which is reimbursable under the PECFA Program. In addition, the claimant failed to establish that the other purposes for which it claimed reimbursement was a necessary cost directly related to the remediation effort being undertaken at the site. Under the circumstances, its request for reimbursement for expenses related to dust abatement and soil compaction cannot be reimbursed under the provisions of the PECFA program.

## **PROPOSED CONCLUSIONS OF LAW**

1. The claimant is an owner and operator of a business eligible for reimbursement under the PECFA program within the meaning of section 101.143(3) of the statutes.
2. The remediation conducted by the claimant at its site in Waukesha, Wisconsin, was eligible for PECFA reimbursement within the meaning of section 101.143 of the statutes.
3. The department's action in denying reimbursement in the amount of \$22,240.00 was reasonable pursuant to section 101.143 of the statutes and ILHR 47.30(2)(a)(15).

## **PROPOSED DECISION**

The department's decision dated July 24, 1997, is affirmed as it relates to the denial of costs of \$22,240.00 associated with the water wagon trucking costs, and the remainder of nonreimbursable costs is remanded to the department for resolution, if not otherwise resolved.

## **APPEAL TRIBUNAL**

by  
David C. Wagner  
Administrative Law Judge

97-110/mm

**STATE OF WISCONSIN**

## DEPARTMENT OF COMMERCE

*In the Matter of the PECFA Appeal of*

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PECFA Claim # 53186-5142-10B  
Hearing #97-1 10

### DELEGATION ORDER -- PECFA APPEAL

I, Brenda J. Blanchard, Secretary of the Department of Commerce, pursuant to §227.46(3)(a), Stats., do hereby delegate to the administrative law judge assigned to the above captioned appeal the authority to issue a final decision if a contested case hearing is not held because of withdrawal, default, settlement, untimeliness of the appeal, mootness of the appeal, lack of subject matter jurisdiction, or lack of standing to appeal. Pursuant to §227.46(3)(c), Stats., if a decision addressing the merits of the appeal is required or it is decided on any basis not delegated to the administrative law judge as described above, it shall be issued by the administrative law judge pursuant to the procedures in §227.46(2) as a proposed decision, and the Executive Assistant of the Department, Terry W. Grosenheider, shall make the final decision for the department.

Dated: April 6, 1999

Brenda Blanchard  
Secretary  
Department of Commerce

Copies to:

Ronald P. Brockman  
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932 Lake Ave  
Racine WI 53403-1519

Kelly Cochrane, Assistant Legal Counsel  
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